FOR ARGUMENT

No. 79-244

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN M. SALVUCCI, JR., AND JOSEPH G. ZACKULAR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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The "automatic standing" rule of *Jones* v. *United States*, 362 U.S. 257 (1960), enables a defendant to seek the suppression of evidence on Fourth Amendment grounds even though his own constitutional rights were not violated.[1] It thus serves to "allow a

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[1] The question presented in this case (Pet. 2; U.S. Br. 2) is "[w]hether a defendant *whose constitutional rights were not violated by an unlawful search* may nevertheless obtain suppression of an item seized during the search solely because the indictment charges him, as an essential element of the offense, with unlawful possession of that item at the time of the search" (emphasis added).

defendant to assert the Fourth Amendment rights of another." *Rakas* v. *Illinois*, 439 U.S. 128, 135 n.4 (1978). In this way, the "automatic standing" rule is at odds with the well-settled principle that " 'Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.' " *Rakas* v. *Illinois, supra*, 439 U.S. at 133-134, quoting *Alderman* v. *United States*, 394 U.S. 165, 174 (1969).

In our opening brief we demonstrated that neither of the two rationales relied on in *Jones*—"the [defendant's] self-incrimination dilemma" and "the vice of prosecutorial self-contradiction" (*Brown* v. *United States*, 411 U.S. 223, 228, 229 (1973))—is adequate to sustain the continued validity of the "automatic standing" rule. This argument remains largely unanswered by respondents.[2]

Instead, respondent Salvucci offers a wholly different theory to support the "automatic standing"

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[2] Respondents do suggest (Salvucci Br. 13-14; Zackular Br. 5-8) that the self-incrimination dilemma persists despite *Simmons* v. *United States*, 390 U.S. 377 (1968), because of the possibility that the prosecutor could use a defendant's suppression-hearing testimony to impeach the defendant's testimony at trial, to gain leads to other evidence against the defendant, to prepare the government's trial strategy, or to learn of additional crimes with which to charge the defendant. These concerns, together with the further contention that in some jurisdictions the defendant's suppression-hearing testimony may be substantively admissible at trial as a prior inconsistent statement (see Fed. R. Evid. 801(d)(1)(A)), are also advanced in support of the "automatic standing" rule by petitioner in *Rawlings* v. *Kentucky*, cert. granted, No. 79-5146 (Dec. 10, 1979). See Pet. Br. 31-40. Of course, these issues regarding the limits of *Simmons* are not before the

rule. He first contends (Br. 5-11) that, at least in cases where possession at the time of the search is an essential element of the offense as charged, a de-

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Court in this case except insofar as they may bear on "automatic standing."

We have previously indicated (U.S. Br. 21-23 n.14) our view that *Simmons* does not preclude the use of a defendant's suppression-hearing testimony for impeachment purposes at trial. This position is in accord with the decisions of those courts that have considered the issue. See *Gray* v. *State*, 43 Md. App. 238, 403 A.2d 853 (1979); *People* v. *Douglas*, 66 Cal. App. 3d 998, 136 Cal. Rptr. 358 (1977); *State* v. *Buckley*, 171 Mont. 238, 557 P.2d 283 (1976); *People* v. *Sturgis*, 58 Ill. 2d 211, 317 N.E.2d 545 (1974); *State* v. *Petrovich*, 125 N.J. Super. 147, 309 A.2d 281 (1973); *State* v. *Vega*, 163 Conn. 304, 306 A.2d 855 (1972). See also *Bailey* v. *United States*, 389 F.2d 305, 311 (D.C. Cir. 1967), cited in *Simmons, supra*, 390 U.S. at 392 n.16, and *Woody* v. *United States*, 379 F.2d 130, 131-132 (D.C. Cir.) (Burger, J.), cert. denied, 389 U.S. 961 (1967). As discussed in our opening brief, however, this impeachment rule rests on the defendant's obligation to testify truthfully and limits only his ability to make contradictory statements at the two proceedings. Thus, it does not constitute the "dilemma" posed in *Jones* that a defendant's truthful testimony at the suppression hearing was tantamount to an admissible confession of guilt regardless of whether he took the stand at trial. To the extent that "such use create[s] an unacceptable risk of deterring the prosecution of marginal Fourth Amendment claims, thus weakening the efficacy of the exclusionary rule as a sanction for unlawful police behavior" (*McGautha* v. *California*, 402 U.S. 183, 211 (1971)), the appropriate course would be to expand the *Simmons* use-immunity, not to perpetuate the "automatic standing" rule.

For much the same reasons, the use of a defendant's prior inconsistent testimony as substantive rebuttal evidence at trial, even if permitted by *Simmons*, would not present the *Jones* self-incrimination dilemma. Rather than having the potential of inducing a truthful defendant to forgo a legiti-

fendant's possessory interest in the item *seized* is sufficient in and of itself to entitle the defendant to raise a Fourth Amendment challenge to the underlying *search*.[3] He then asserts (Br. 11-14) that the

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mate Fourth Amendment claim, this use of the defendant's statements would simply help to discourage fabricated defenses at trial. And once again, if the Court concludes that such use is impermissible, the better solution would be to extend the scope of *Simmons*, not to exclude reliable and probative evidence under the rule of "automatic standing."

Finally, the fear of a prosecutorial "fishing expedition" at the suppression hearing does not militate in favor of "automatic standing." This argument overlooks the responsibility of the prosecutor and the authority and duty of the presiding judicial officer to keep the hearing within proper bounds. But more importantly, it is completely unrelated to the "special problem" (362 U.S. at 261) regarding possessory offenses that concerned the Court in *Jones*. On the contrary, this argument is equally applicable to all suppression hearings and, if accepted, would lead to the conclusion that no defendant should be required to establish "standing." This Court, however, has repeatedly declined to broaden without limit the class of defendants that may move to suppress evidence, and as *Jones* itself noted (362 U.S. at 261), "[o]rdinarily * * * it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy."

[3] This argument also arises outside the context of "automatic standing" as an asserted basis for a defendant's "actual standing." Indeed, petitioner in *Rawlings* v. *Kentucky*, *supra*, makes precisely the same argument (Br. 46-58) to show his "actual standing" to contest the search in that case. See also *United States* v. *Mazzelli*, 595 F.2d 1157 (9th Cir. 1979), petition for cert. pending *sub nom. United States* v. *Conway*, No. 79-393 (filed Sept. 7, 1979). Our response to this aspect of Salvucci's argument on "automatic standing" is fully applicable to these related arguments on "actual standing."

requisite possessory interest is necessarily established by the very charge of unlawful possession for which the defendant is being prosecuted, and therefore that the "automatic standing" rule is justified to avoid the needless formality of an inquiry into "standing" at the suppression hearing. In our view, however, neither the premise nor the conclusion of this position is sound.

I. BECAUSE A DEFENDANT'S POSSESSORY INTEREST IN CONTRABAND SEIZED DURING A SEARCH DOES NOT ENTITLE HIM TO SEEK SUPPRESSION OF THAT EVIDENCE ON THE GROUND THAT THE SEARCH VIOLATED THE FOURTH AMENDMENT, THE "AUTOMATIC STANDING" RULE CANNOT BE JUSTIFIED BY REFERENCE TO PRINCIPLES OF "ACTUAL STANDING"

A. A Proprietary Or Possessory Interest In Items Seized Does Not Entitle A Defendant To Challenge The Underlying Search

The Fourth Amendment protects against both unreasonable searches and unreasonable seizures. As is now well settled (see U.S. Br. 9-10), the touchstone of a search is a governmental intrusion upon a person's legitimate expectation of privacy. In contrast, the salient feature of a seizure of physical evidence is a governmental interference with the complex of property rights derived from a person's interest in or relation to a particular object. A search "depends not upon a property right in the invaded place" (*Rakas* v. *Illinois*, *supra*, 439 U.S. at 143) but rather on an expectation of privacy "that society is prepared

to recognize as 'reasonable' " (*id.* at 144 n.12, quoting *Katz* v. *United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)); [4] a seizure, on the other hand, implicates precisely those property rights that a person has by virtue of his ownership or possession of the given object.[5]

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[4] While property interests remain relevant in assessing one's reasonable expectation of privacy (*Rakas* v. *Illinois*, *supra*, 439 U.S. at 143-144 n.12), even the owner of the premises or property searched is not entitled to seek the suppression of evidence if he had no privacy interest that was invaded. See, *e.g.*, *United States* v. *Rios*, 611 F.2d 1335, 1345 (10th Cir. 1979); *United States* v. *Dall*, 608 F.2d 910, 914 (1st Cir. 1979), cert. denied, No. 79-5769 (Mar. 3, 1980); *United States* v. *Dyar*, 574 F.2d 1385, 1390 (5th Cir.), cert. denied, 439 U.S. 982 (1978).

[5] At one time, the law of both searches and seizures was grounded in property concepts. For example, in cases of eavesdropping or electronic surveillance, the once-prevailing rule was that the Fourth Amendment did not apply unless there occurred a trespass or other infringement of the person's property right. See *Goldman* v. *United States*, 316 U.S. 129 (1942); *Olmstead* v. *United States*, 277 U.S. 438 (1928). This rule was repudiated in *Katz* v. *United States*, 389 U.S. 347, 353 (1967), on the basis "that the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures" and that "[t]he Government's activities in electronically listening to and recording the [defendant's] words violated the privacy upon which he justifiably relied while using the telephone booth." Similarly, in *Jones* v. *United States*, *supra*, 362 U.S. at 266, the Court disapproved the "course of decisions by lower courts" that a person's "standing" to challenge a search depended upon his rights in the searched area under the common law of private property. See also *Rakas* v. *Illinois*, *supra*, 439 U.S. at 142-143, 148-149 n.17.

With respect to seizures, "historically the right to search for and seize property depended upon the assertion by the

Salvucci's contention—that a defendant is entitled to challenge the validity of a search of a third-party's premises or property solely because he claims a possessory interest in an item seized during that search—ignores this fundamental distinction between a search and a seizure. While the defendant in those circumstances may litigate the legality of the seizure, he has no interest cognizable under the Fourth Amendment that allows him to contest the lawfulness of the search of another person's property or premises.[6]

Government of a valid claim of superior interest [in the property]." *Warden* v. *Hayden*, 387 U.S. 294, 303 (1967). This so-called "mere evidence" rule, which allowed governmental seizures of contraband or instrumentalities or fruits of crimes but not of items that were of only evidentiary value, was abandoned by the Court in *Hayden*. Thus, while a seizure is still defined with reference to a person's property interest in the seized object, it is no longer required that the government assert a superior interest in order to take possession.

[6] Respondents have not attacked the seizure of the stolen mail from the apartment rented by Zackular's mother, nor could they reasonably do so.

For the first time, Salvucci now argues (Br. 10 n.6) that the stolen mail was contained in a cardboard box, a paper bag, and a white envelope (see A. 15) and hence that the police officers' search of these containers gives respondents "actual standing" to controvert the validity of the warrant. We suggest that the Court should not consider this contention, since it was not raised in the courts below. See, *e.g.*, *Hankerson* v. *North Carolina*, 432 U.S. 233, 240 n.6 (1977) ("[a] respondent may make any argument *presented below* that supports the judgment of the lower court") (emphasis added); compare *United States* v. *New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977). In any event, Salvucci does not

These principles are clearly illustrated by *United States* v. *Lisk*, 522 F.2d 228 (7th Cir. 1977), cert. denied, 423 U.S. 1078 (1976), subsequent opinion, 559 F.2d 1108 (7th Cir. 1977). In *Lisk*, the defendant gave an explosive bomb to one Hunt for Hunt to keep in the trunk of his car until the defendant asked for its return; the defendant had no interest in Hunt's car but, according to a stipulation in the case, he retained a proprietary interest in the bomb. Approximately five days thereafter, the police officers searched the automobile and seized the bomb from the trunk. The government conceded that this search violated Hunt's Fourth Amendment rights, but it contended that the defendant did not have "standing" to move for suppression because his privacy was not invaded by the unlawful search of Hunt's car. The court of appeals agreed, rejecting the defendant's claim that his proprietary interest in the seized bomb established his "standing" to challenge the search. As then-Judge Stevens explained (522 F.2d at 230-231; footnotes omitted; emphasis in original):

> There is a difference between a search and a seizure. A search involves an invasion of privacy;

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claim that these receptacles were his or that he had a reasonable expectation of privacy with respect to them, and nothing in the record would lend credence to such a claim. Moreover, we doubt that containers like a paper bag or a cardboard box, particularly where used only to conceal the fruits of criminal activity, can generally support a reasonable expectation of privacy. See, *e.g.*, *United States* v. *Block*, 590 F.2d 535, 541 n.8 (4th Cir. 1978); *United States* v. *Neumann*, 585 F.2d 355, 360-361 (8th Cir. 1978); see also *Arkansas* v. *Sanders*, No. 77-1497 (June 20, 1979), slip op. 9 n.9, 11-12 & n.13.

> a seizure is a taking of property. The owner of a chattel which has been seized certainly has standing to seek its return. It does not necessarily follow that he may also object to its use as evidence * * *. * * * Hunt's car was searched and defendant's property was seized. The invasion of Hunt's privacy was a violation of Hunt's Fourth Amendment rights, but this violation is clearly not available to the defendant as a basis for suppressing evidence acquired thereby. Defendant must rely on the seizure of the firearm as a violation of his own Fourth Amendment rights. * * * In sum, defendant has standing to object to the seizure, but no standing to object to the search. Having put the search to one side, he has not demonstrated that the evidence should be suppressed on the ground that *his* Fourth Amendment rights were violated by the seizure.[7]

Lisk represents the leading decision in this area and, in addition to the Seventh Circuit, the other courts of appeals to have considered the question have concluded with near uniformity that a defendant's

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[7] The court in *Lisk* recognized (522 F.2d at 230 & n.5) that, with respect to the defendant's proprietary interest in the seized bomb, the case was the same as if Hunt had consented to the search of the car or the bomb had been found in plain view. See also *United States* v. *Mazzelli*, *supra*, 595 F.2d at 1160 (Bonsal, J., dissenting) (defendant's Fourth Amendment rights based on items seized are no different than if a warrant had been obtained to search the third-party's premises or property); *United States* v. *Galante*, 547 F.2d 733, 739 n.11 (2d Cir. 1976), cert. denied, 431 U.S. 969 (1977). Compare *Mancusi* v. *DeForte*, 392 U.S. 364, 369-370 (1968) (defendant's reasonable expectation of privacy in his office was not dispelled by the fact that others could have given consent to search but did not do so).

possessory interest in an item seized does not entitle him to object to the search of a third-party's premises or property in which he had no reasonable expectation of privacy. See *United States* v. *Galante*, 547 F.2d 733, 739 & n.11 (2d Cir. 1976), cert. denied, 431 U.S. 969 (1977); *United States* v. *Lopez*, 420 F.2d 313, 316-317 (2d Cir. 1969) (Friendly, J.); *United States* v. *Crowell*, 586 F.2d 1020, 1026 (4th Cir. 1978), cert. denied, 440 U.S. 959 (1979); *United States* v. *Jackson*, 585 F.2d 653, 656-657 (4th Cir. 1978); *United States* v. *Evans*, 572 F.2d 455, 486 (5th Cir.), cert. denied, 439 U.S. 870 (1978); *United States* v. *Archbold-Newball*, 554 F.2d 665, 677-678 (5th Cir.), cert. denied, 434 U.S. 1000 (1977); *United States* v. *Smith*, 550 F.2d 277, 283 (5th Cir.), cert. denied, 434 U.S. 841 (1977); *United States* v. *Hunt*, 505 F.2d 931, 940-941 (5th Cir. 1974), cert. denied, 421 U.S. 975 (1975); *United States* v. *Hunter*, 550 F.2d 1066, 1074-1075 (6th Cir. 1977); *United States* v. *Wilson*, 536 F.2d 883, 885 (9th Cir.), cert. denied, 429 U.S. 982 (1976); but see *United States* v. *Mazzelli*, 595 F.2d 1157, 1159 & n.1, 1160 (9th Cir. 1979), petition for cert. pending *sub nom. United States* v. *Conway*, No. 79-393 (filed Sept. 7, 1979). See also *United States* v. *House*, 524 F.2d 1035, 1042 (3d Cir. 1975) (owner has "standing" to object to the seizure of his property from the temporary possession of a third party).[8] Commentators have also

[8] A similar analysis is reflected in "the present well-settled rule that a guest in a hotel or motel loses his reasonable expectation of privacy and consequently any standing to object to 'an unauthorized search of the premises' after his

reached a like conclusion. See, *e.g.*, Knox, *Some Thoughts on the Scope of the Fourth Amendment and Standing to Challenge Searches and Seizures*, 40 Mo. L. Rev. 1, 50 (1975) ("A possessory interest in the item seized should give rise to fourth amendment protection and should entitle an individual to challenge the reasonableness of the seizure. * * * A mere possessory interest in the item *seized* would not, however, confer standing to challenge the *search* which led to the discovery of that item.") (emphasis in original); 3 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 11.3, at 563 (1978).[9]

rental period has terminated * * * even though he may have left property in the hotel room." *United States* v. *Jackson*, *supra*, 585 F.2d at 658. See, *e.g.*, *United States* v. *Akin*, 562 F.2d 459, 463-464 (7th Cir. 1977), cert. denied, 435 U.S. 933 (1978); *United States* v. *Parizo*, 514 F.2d 52 (2d Cir. 1975); *United States* v. *Croft*, 429 F.2d 884 (10th Cir. 1970).

[9] Of course, if items are seized from an area in which the defendant has a legitimate expectation of privacy, such as his house, his person, or his luggage, he would be entitled to seek suppression on that basis regardless of any interest in the seized property. See *Arkansas* v. *Sanders*, No. 77-1497 (June 20, 1979), slip op. 2-3, 8 n.8; *Alderman* v. *United States*, *supra*, 394 U.S. at 177 & n.10; *Mancusi* v. *DeForte*, 392 U.S. 364, 367 n.4 (1968). Moreover, a defendant may have a reasonable expectation of privacy in an area even though he does not hold title to that area or otherwise enjoy a common-law property interest. See *Mancusi* v. *DeForte*, *supra*; *Jones* v. *United States*, *supra*; *United States* v. *Jeffers*, 342 U.S. 48 (1951); see also *Rakas* v. *Illinois*, *supra*, 439 U.S. at 143-144 & n.12. Thus, it is possible that one who temporarily entrusts his possessions to the custody of another, which possessions are then seized during an unlawful search of the custodian's premises, may be entitled to challenge the legality of the search as well as of the seizure. This would turn not on the

Notwithstanding the assertions of Salvucci (Br. 6-7) and of petitioner in *Rawlings* v. *Kentucky, supra* (Br. 46-49), the decisions of this Court do not compel a different result. In *Rakas* v. *Illinois, supra,* the Court acknowledged (439 U.S. at 142 & n.11) the possibility that a person who otherwise would not have a reasonable expectation of privacy in a given area might in fact have such an expectation if his own property were located and seized there. In our view, this portion of the opinion is merely an application of the more general principle, also recognized in *Rakas* (439 U.S. at 143-144 & n.12), that a person's

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owner's property interest in his belongings, however, but rather on any privacy interest in the searched area that he may have acquired incident to the transfer of his property. See Knox, *supra,* 40 Mo. L. Rev. at 50-52; 3 W. LaFave, *supra,* § 11.3, at 556-562; but see Gutterman, *"A Person Aggrieved": Standing to Suppress Illegally Seized Evidence in Transition,* 23 Emory L.J. 111, 118-120, 125-126 (1974). In our view, an analysis of that privacy interest would look to such factors as the relationship between the two parties; the existence of a common understanding regarding the nature of the particular item, the specific location in which it is to be kept, and the need for it to be securely or privately stored; and the authority of the bailee to use the item while it is in his custody. Respondents have never claimed that they had any expectation of privacy in the apartment of Zackular's mother, or even that they had her permission to store things there. Petitioner in *Rawlings* v. *Kentucky, supra,* does assert (Br. 57-62) that he had a reasonable expectation of privacy in Vanessa Cox's purse in which his narcotics were found. However, we doubt that such an expectation is demonstrated where, as in that case, the seized items consisted of contraband narcotics that the defendant had placed in his companion's purse, over her objection, only a few minutes before the police arrived (see Kentucky Br. 3, 26-27).

use of an area may be indicative of his expectation of privacy. See also 439 U.S. at 153 (Powell, J., concurring). Especially since the record did not establish that the defendants in *Rakas* owned the rifle and shells found by the police (see 439 U.S. at 129, 130-131 & n.1, 148), we do not read the Court's opinion to suggest in any way that a proprietary or possessory interest in the items seized would, without more, entitle a defendant to contest the underlying search. See also 439 U.S. at 164 n.14 (White, J., dissenting).[10]

Nor is *United States* v. *Jeffers,* 342 U.S. 48 (1951), to the contrary. The defendant in *Jeffers* was con-

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[10] The Court in *Rakas* also refused to remand for further factual proceedings on the question of ownership of the seized rifle and shells, since it found that the defendants had failed to assert their claim of ownership at the suppression hearing (439 U.S. at 130-131 n.1). We do not believe, however, that the Court's discussion in this regard can properly be taken to establish that such an interest, if timely raised and adequately demonstrated, would have sufficed to allow the defendants to challenge the search. Similarly, the issue raised here was not presented in *Brown* v. *United States, supra; Combs* v. *United States,* 408 U.S. 224 (1972); *Mancusi* v. *DeForte, supra;* or *Simmons* v. *United States, supra,* and we do not construe the Court's passing references on which Salvucci and Rawlings rely to signal a considered disposition of the matter. Finally, in *Jones* v. *United States, supra,* the Court, in accordance with the submissions of both parties (Pet. Br. 18, 32-38; U.S. Br. 13, 18-19, 24-25), appears to have assumed but not decided that a defendant would have "standing" to suppress if he alleged that he owned or possessed the seized property (362 U.S. at 261-263), an interest that the defendant in *Jones* did not assert (362 U.S. at 259). See also *United States* v. *Lisk, supra,* 522 F.2d at 233 n.5.

victed of violating the narcotics laws on the basis of drugs that were found during a warrantless search of a hotel room rented by his aunts. The search occurred while neither the defendant nor his aunts were present. The defendant had been given a key to the room and was permitted to use it at will, and he had in fact often entered the room for various purposes. In addition, the defendant claimed ownership of the narcotics that were seized. On that record, the Court held that the defendant had "standing" to contest the validity of the search. We do not read *Jeffers* to stand for the proposition that an interest in the property seized is, without more, a sufficient basis to seek the suppression of evidence. Rather, "[s]tanding in *Jeffers* was based on Jeffers' possessory interest in *both* the premises searched and the property seized." *Rakas* v. *Illinois*, *supra*, 439 U.S. at 136 (emphasis added). While the Court has construed *Jeffers* to establish that "one with a possessory interest in [but not title to] the premises might have standing" (*Mancusi* v. *DeForte*, *supra*, 392 U.S. at 368), it has "never cited *Jeffers* as adopting * * * [the] theory [that the defendant's interest in the seized property is itself sufficient to confer "standing" to challenge the search], and we are persuaded that it is not a correct reading of the *Jeffers* opinion itself." *United States* v. *Lisk*, *supra*, 522 F.2d at 233 (footnote omitted). The lower federal courts have read *Jeffers*, as we do, to rest on the theory "that the defendant's interest in the searched room rather than in the seized property allowed him to challenge the

search." *United States* v. *Lisk*, *supra*, 522 F.2d at 232 (footnote omitted). See also *United States* v. *Jackson*, *supra*, 585 F.2d at 657 n.5; *United States* v. *Lopez*, *supra*, 420 F.2d at 317. Thus, we do not believe that *Jeffers* should be interpreted to hold that a defendant's interest in seized property establishes his "standing" to contest the underlying search. In any event, as discussed above (pages 5-7, *supra*), more recent decisions of this Court cast substantial doubt on the continued validity of a rule that allows a defendant to challenge a search solely because of his interest in the items seized.

B. A Defendant's Possessory Interest In Contraband Is Totally Illegitimate And Does Not Give Rise To Any Rights Under The Fourth Amendment

Regardless of whether a defendant's interest in the item seized is generally sufficient to entitle him to contest the validity of the underlying search, we submit that an asserted possessory interest in contraband cannot serve as the basis of a Fourth Amendment claim. In our view, such an illicit interest is a wholly inadequate basis on which to rest a challenge to either a search or a seizure.[11]

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[11] Of course, if contraband is seized from a place in which the defendant has a legitimate expectation of privacy that exists independently of the placement of the contraband, then he may seek suppression on that basis despite the illegitimacy of his interest in the contraband itself. See, *e.g.*, *Arkansas* v. *Sanders*, No. 77-1497 (June 20, 1979), slip op. 2-3, 8 n.8; *Warden* v. *Hayden*, *supra*, 387 U.S. at 305-306; *Jones* v. *United States*, *supra*; *United States* v. *Jeffers*, *supra*. See also note 9, *supra*.

This Court has emphasized that the Fourth Amendment's protection against unreasonable searches extends only to violations of *legitimate* expectations of privacy. See, *e.g.*, *Rakas* v. *Illinois*, *supra*, 439 U.S. at 141 n.9, 143-144 n.12; *Brown* v. *United States*, *supra*, 411 U.S. at 230 n.4; *Jones* v. *United States*, *supra*, 362 U.S. at 267; see also U.S. Br. 9-10. "[H]owever, a 'legitimate' expectation of privacy by definition means more than a subjective expectation of not being discovered. * * * [It must be] 'one that society is prepared to recognize as "reasonable."'" *Rakas* v. *Illinois*, *supra*, 439 U.S. at 143-144 n.12, quoting *Katz* v. *United States*, *supra*, 389 U.S. at 361 (Harlan, J., concurring). For this reason, as the Court noted in *Jones*, one whose interest is "wrongful * * * cannot invoke the privacy of the premises searched" (362 U.S. at 267). Thus, a person present in a stolen automobile at the time of a search has no legitimate expectation of privacy with respect to that automobile and therefore cannot object to the legality of the search. See *Rakas* v. *Illinois*, *supra*, 439 U.S. at 141 n.9. See also *United States* v. *McCambridge*, 551 F.2d 865, 870 n.2 (1st Cir. 1977) (no "standing" to challenge search of stolen suitcase).

Likewise, the Fourth Amendment does not recognize a legitimate possessory interest in contraband items that, by definition, a person may not lawfully possess, and one who is in wrongful possession cannot on that ground maintain a Fourth Amendment challenge to a search or a seizure involving such property. For example, an asserted interest in stolen goods is, as the

Court observed in *Brown* v. *United States*, "totally illegitimate" (411 U.S. at 230 n.4) and hence does not give rise to any rights under the Fourth Amendment. The courts of appeals have also held that a person has no legitimate interest in stolen property. See *United States* v. *McCambridge*, 551 F.2d 865, 870 n.2 (1st Cir. 1977); *United States* v. *Galante*, 547 F.2d 733, 739-740 (2d Cir. 1976), cert. denied, 431 U.S. 969 (1977); *United States* v. *Sacco*, 436 F.2d 780, 784 (2d Cir.), cert. denied, 404 U.S. 834 (1971); *United States* v. *Bozza*, 365 F.2d 206, 223 (2d Cir. 1966) (Friendly, J.). See also Gutterman, *supra*, 23 Emory L. J. at 118-120; Trager & Lobenfeld, *The Law of Standing Under the Fourth Amendment*, 41 Brooklyn L. Rev. 421, 438-444 (1975). The courts of appeals have similarly recognized that possession of contraband narcotics cannot support a legitimate Fourth Amendment interest. As the court observed in *United States* v. *Moore*, 562 F.2d 106, 111 (1st Cir. 1977), cert. denied, 435 U.S. 926 (1978), "the possessors of such [contraband] articles have no legitimate expectation of privacy in substances which they have no right to possess at all. The narcotics peddler * * * has no privacy interest in the substance * * *." See also, *e.g.*, *United States* v. *Bruneau*, 594 F.2d 1190, 1194 n.6 (8th Cir.), cert. denied, No. 78-6592 (Oct. 1, 1979) ("courts have consistently held that * * * no one has [a legitimate privacy interest in contraband]"); *United States* v. *Botero*, 589 F.2d 430 (9th Cir. 1978), cert. denied, 441 U.S. 944 (1979); *United States* v. *Washington*, 586 F.2d 1147,

1154 (7th Cir. 1978); *United States* v. *Dubrofsky*, 581 F.2d 208, 211 (9th Cir. 1978); *United States* v. *Pringle*, 576 F.2d 1114, 1119 (5th Cir. 1978); *United States* v. *Emery*, 541 F.2d 887, 890 (1st Cir. 1976).[12] And we suggest that the same analysis is applicable to other forms of contraband, such as an unlawful firearm or a firearm unlawfully possessed by a previously convicted felon.

> Where the law absolutely forbids possession of a particular item, it is difficult to accept the proposition that a defendant has a fourth amendment interest in that item as opposed to, for example, the area in which it is located, *e.g.*, a house, apartment, office, or car. Surely, the only assumption that a thief or narcotics dealer can reasonably make is that law enforcement officials will seek to deprive him of possession of the contraband. Seizure can hardly be unanticipated. If the contraband is seized while hidden in an open field or in a confederate's home, neither the dealer nor the thief can claim a violation of his privacy. As Judge Friendly has rightly remarked, the values sought to be protected by the fourth amendment are not "served by holding that a thief who has left evidence of his crime on the premises of a confederate is subrogated to the latter's right to complain of a search and seizure * * *."

Trager & Lobenfeld, *supra*, 41 Brooklyn L. Rev. at 441, quoting *United States* v. *Bozza*, *supra*, 365 F.2d at 223.[13]

[12] We recognize that *United States* v. *Jeffers*, *supra*, can be read to allow a suppression claim to be based on the defendant's interest in the seized goods even though they are contraband. As discussed above (pages 13-15, *supra*), however, we think *Jeffers* is best understood in terms of the defendant's legitimate expectation of privacy in the hotel room that was searched, an expectation that is not lost simply because the defendant used the room in part as a storage area for his narcotics. Moreover, insofar as *Jeffers* rested on the defendant's interest in the drugs that were seized, we suggest that it is inconsistent with subsequent decisions of this Court and therefore can no longer be regarded as controlling.

[13] Respondents Salvucci (Br. 9) and Zackular (Br. 7 & n.4) argue that the effect of this argument and of the elimination of the "automatic standing" rule would be to encourage illegal police action and erode the deterrent function of the exclusionary rule. These assertions are unfounded. The "standing rule is premised on a recognition that the need for deterrence and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct would result in the imposition of a criminal sanction on the victim of the search." *United States* v. *Calandra*, 414 U.S. 338, 348 (1974). As the Court explained in *Alderman* v. *United States*, *supra*, 394 U.S. at 174-175:

> The deterrent values of preventing the incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression of probative evidence even though the case against the defendant is weakened or destroyed. We adhere to that judgment. But we are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth.

See also *Rakas* v. *Illinois*, *supra*, 439 U.S. at 137; *United States* v. *Ceccolini*, 435 U.S. 268, 275-276 (1978); *Stone* v. *Powell*, 428 U.S. 465, 488-489 (1976); *United States* v. *Janis*, 428 U.S. 433, 447 n.16 (1976); *United States* v. *Calandra*, *supra*, 414 U.S. at 350-351. Thus, with the single exception

In the instant case, the seized items consisted of stolen mail—items to which respondents had no rightful claim. Accordingly, irrespective of whether a lawful interest in seized property would suffice to permit a challenge to the antecedent search that uncovers the property, we submit that respondents' illicit interest in the stolen mail is inadequate to entitle them to seek suppression of that evidence.[14]

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of "automatic standing," the Court has consistently adhered to the principle that "only defendants whose Fourth Amendment rights have been violated [are permitted] to benefit from the [exclusionary] rule's protections." *Rakas* v. *Illinois*, *supra*, 439 U.S. at 134 (footnote omitted). See *id.* at 134 n.3; *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 562-563 n.9 (1978); *United States* v. *Miller*, 425 U.S. 435, 444-445 (1976); *Brown* v. *United States*, *supra*, 411 U.S. at 230; *Alderman* v. *United States*, *supra*, 394 U.S. at 171-172, 174. For the same reasons that the Court has previously declined to extend "standing" to those, including the target of the search (*Rakas* v. *Illinois*, *supra*, 439 U.S. at 132-138; *id.* at 156 n.1 (White, J., dissenting)), whose Fourth Amendment rights were not violated, the deterrent objectives of the exclusionary rule do not require that the "automatic standing" doctrine be retained or that defendants be permitted to challenge the validity of a search solely on the basis of their possessory interest in the contraband seized. Rather, adequate deterrence results from allowing a defendant to seek suppression based on an unreasonable search only if his legitimate expectation of privacy was thereby infringed.

[14] We also note that the common-law actions of "[t]respass, replevin, and the other means of redress for persons aggrieved by searches and seizures" were not available with respect to contraband, which "at common law could be seized with impunity." *Warden* v. *Hayden*, *supra*, 387 U.S. at 303-304, 305-306. See also W. Prosser, *The Law of Torts* 78 n.62, 94 (4th ed. 1971) (a thief without colorable claim of right to property cannot recover in an action for trespass or conversion).

II. EVEN IF A DEFENDANT IS ENTITLED TO CHALLENGE A SEARCH SOLELY ON THE BASIS OF HIS POSSESSORY INTEREST IN THE CONTRABAND SEIZED, THE "AUTOMATIC STANDING" RULE SHOULD BE ABOLISHED BECAUSE IT ALLOWS EVIDENCE TO BE SUPPRESSED AT THE BEHEST OF DEFENDANTS WHOSE FOURTH AMENDMENT RIGHTS HAVE NOT BEEN VIOLATED

Respondent Salvucci argues (Br. 11-14) that, in the event he prevails on the foregoing issues, the "automatic standing" rule should be retained in order to promote the efficient administration of justice and eliminate unnecessary suppression hearings. Salvucci bases his argument on the proposition that the possessory offense with which a defendant is charged serves, without more, to establish the requisite possessory interest in the seized contraband to enable him to contest the underlying search. In essence, he contends that the charging of a possessory offense *ipso facto* constitutes an allegation by the government of the existence of facts that would afford "actual standing," and for that reason there is no point in abolishing the "automatic standing" rule.[15] However, as we now show, this argument is misconceived; even assuming that a possessory interest in the property seized will ordinarily give rise to Fourth Amend-

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[15] Since respondents have failed on the present record to adduce proof that they had a sufficient possessory interest in the stolen mail to confer "actual standing," they can succeed here in gaining affirmance of the court of appeals' judgment only if the Court accepts Salvucci's contention that the charging of a possessory offense necessarily demonstrates the defendant's possessory interest for Fourth Amendment purposes.

ment rights in the place that has been searched, there remains a significant category of cases in which the requisite Fourth Amendment interest would not exist, yet the defendant could still properly be charged with a "possessory" offense. Accordingly, the "automatic standing" doctrine should be overturned even if the Court concludes that there can be a Fourth Amendment interest in seized contraband that suffices by itself to enable the defendant to challenge the legality of a search.[16]

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[16] Salvucci's argument is essentially the same as the *Jones* "prosecutorial self-contradiction" argument that we discussed in our opening brief (U.S. Br. 23-28). For the reasons there stated, we submit that a defendant can fail to have the necessary possessory interest under the Fourth Amendment for "actual standing" but still be guilty of a possessory crime as a constructive possessor or an aider and abettor. See also *United States* v. *Rios*, 611 F.2d 1335, 1345 (10th Cir. 1979) (there exists "automatic standing" but not "actual standing" where defendant was charged with aiding and abetting the commission of a possessory offense). In addition, a defendant whose co-conspirators commit a possessory offense can be convicted of that offense under the doctrine of *Pinkerton* v. *United States*, 328 U.S. 640 (1946), but nonetheless have no possessory right that is infringed by the unlawful search of his co-conspirators' premises or property. See *Alderman* v. *United States, supra*, 394 U.S. at 171-172 (defendant cannot assert Fourth Amendment rights of co-conspirator); *United States* v. *Hunt, supra*, 505 F.2d at 942 ("There is in fact nothing contradictory about the United States' argument in this case; a principal-agent relationship sufficient to imply culpability may certainly fall short of conferring standing for Fourth Amendment purposes."). Where a defendant does not have "actual standing," it is not contradictory for the government to charge him with a possessory offense and at the same time contend that he cannot challenge the search that produced the evidence against him.

We think it can scarcely be doubted that a defendant may commit a possessory offense and yet not have the kind of possessory interest required by even the most expansive Fourth Amendment standard. For instance, the head of a large narcotics operation may exercise dominion and control over the illegal drugs and thus be in constructive possession sufficient to violate the criminal code; at the same time, however, if he never holds the drugs or becomes involved in their storage and concealment, he is hardly in a position to raise a Fourth Amendment challenge to the search of the premises or property of one of his subordinates that uncovers the narcotics. Similarly, if this same defendant were held vicariously liable for the possessory offenses of his co-conspirators under the theory of *Pinkerton* v. *United States*, 328 U.S. 640 (1946), he would still not have a Fourth Amendment right that would be infringed by the unlawful search of another's premises or property. Nor would his position under the Fourth Amendment be enhanced in any way if he were convicted and punished as a principal pursuant to 18 U.S.C. 2 for aiding and abetting the unlawful possession of contraband drugs. In all of these cases, the "automatic standing" rule would enable a defendant to seek the suppression of reliable and probative evidence even though the search he challenges did not even remotely affect *his* Fourth Amendment rights.

The fallacy of Salvucci's argument is clearly revealed by *United States* v. *Hunt*, 505 F.2d 931 (5th Cir. 1974), cert. denied, 421 U.S. 975 (1975). The

defendants in that case were charged with willfully, knowingly and unlawfully intercepting and endeavoring to intercept wire communications, in violation of 18 U.S.C. 2511(1)(a) and (2). Among the evidence introduced by the government were the tape recorders and recordings that were paid for by the defendants and seized from confederates acting under their direction. Finding that the "[d]efendants never saw any of the equipment, either during or after the operation" (505 F.2d at 940), the court of appeals held that the defendants' proprietary interest in the seized recorders and tapes did not confer standing on them to challenge the search (505 F.2d at 940-941):

> Whatever title defendants may possess in the disputed evidence, we cannot help but reflect that this discussion of master and servant law and legal title has taken us very far from the substance of Fourth Amendment rights. As we have indicated above, the constitutional right of protection against unreasonable searches and seizures attaches only when an individual's reasonable expectation of privacy is shattered by illegal Government intrusion. Whatever minimal possessory interest defendants may have in the seized equipment, we have been unable to discern the slightest privacy interest that defendants could reasonably assert in objects which they have never seen and of whose particular existence they were unaware until after the disputed search and seizure. If *Jones*, *Katz*, *Alderman* and *Brown* teach us anything, they indicate that common law notions about proprietary relations offer no *per se* rules in search and seizure cases; a naked

> assertion of possessory interest may be indicative but cannot be dispositive of the existence of a cognizable privacy interest in the place or thing searched.

In light of the court's analysis, we strongly doubt that the defendants in *Hunt* would have fared any better if they had been charged—under a theory of constructive possession, of *Pinkerton* liability, or of aiding and abetting—with a possessory offense such as knowing possession of an unlawful intercepting device, in violation of 18 U.S.C. 2512(1)(b). See also *United States* v. *Archbold-Newball*, 554 F.2d 665 (5th Cir.), cert. denied, 434 U.S. 1000 (1977) (based on *Hunt*, defendants claiming a proprietary interest in contraband seized during search of co-defendants' room had no standing to challenge the search).

As illustrated by these examples, we believe that the "automatic standing" rule sweeps too broadly to be a sound and acceptable principle. Thus, at the least, the Court should reject the "automatic standing" rule and require defendants to establish the requisite Fourth Amendment interest in accordance with the Court's disposition of the preceding issues.[17]

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[17] We recognize that in some situations the defendant's interest will be sufficiently evident that no formal hearing will be necessary. Where this is not the case, however, the defendant must demonstrate by adequate proof that his Fourth Amendment rights were violated. See *Rakas* v. *Illinois*, *supra*, 439 U.S. at 130-131 n.1. Contrary to the assertion (Br. 55-56) of petitioner in *Rawlings* v. *Kentucky*, *supra*, we see no reason to assume that suppression hearings would generally become more extensive than at present or "be expanded in

CONCLUSION

For the foregoing reasons, and for the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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many instances into a miniature replica of the trial on the merits" under the position we advocate here. In the event the "automatic standing" rule is maintained, as Rawlings urges, a full suppression hearing would be required in every case involving a possessory offense in order to determine the lawfulness of the challenged search. It seems most unlikely that a significant incremental burden would be imposed if those hearings also included the issue whether the defendant is entitled to seek the suppression of evidence; to the extent that particular difficulties might arise in individual cases, the district court has authority to defer disposition of the suppression motion until after the trial and verdict (see Fed. R. Crim. P. 12(e)). Indeed, the position we advance might well serve to enhance judicial economy by eliminating the need for plenary hearings on the legality of police conduct in cases where the defendant currently comes within the "automatic standing" rule but it can be readily determined that, under our standard, he has no right to raise a Fourth Amendment claim.

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